Decision 01-06-079 June 28, 2001

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

County of Orange, Complainant, vs. AT&T Communications of California, Inc. (U 5002 C), Defendant.	Case 00-06-020 (Filed June 16, 2000)

O P I N I O N

This decision grants the motion of the County of Orange (County or Complainant) to dismiss the above-captioned complaint without prejudice. Parties may seek to resolve their dispute in civil court. Funds deposited in escrow shall be disbursed to the complainant. The Commission reserves the right to issue an Order to show cause why the County should not be found in violation of Rule 1.

I. Procedural Background

This complaint, filed by the County on June 16, 2000, involves allegations of billing overcharges under contracts for telephone service entered into between the County and AT&T Communications of California, Inc. (AT&T). The County also asked for a full accounting from AT&T of the billed amounts that were

properly due, and an order from the Commission directing AT&T to refund overcharges to the County.

On July 13, 2000, AT&T filed a motion to dismiss, arguing that the complaint failed to state a clear cause of action, was unduly vague, and was at least partially barred by the statute of limitations. Complainant filed an opposition to the motion on July 26, 2000, and AT&T filed a further reply on September 11, 2000. An Administrative Law Judge (ALJ) Ruling, issued October 5, 2000, denied the motion to dismiss, but amended the scope of the complaint to exclude any disputed charges that were barred from recovery by the statute of limitations.

On November 3, 2000, AT&T filed an Answer to the Complaint. On December 12, 2000, an ALJ Ruling scheduled a prehearing conference (PHC) for January 23, 2001. The ALJ subsequently granted the Complainant and Defendant's joint request for the PHC to be postponed to permit parties to pursue settlement discussions.

After parties informed the ALJ that attempts to reach a settlement had been unsuccessful, the ALJ and assigned Commissioner conducted a telephonic conference on February 14, 2001 where Complainant indicated its intent to file a motion to dismiss the complaint and to have the dispute resolved in Superior Court. The ALJ set a schedule for discovery to proceed and for parties to file pleadings with respect to the County's motion to dismiss.

On February 21, 2001, the motion to dismiss the above-captioned complaint was filed by County The motion was made pursuant to Rule 56 of the Commission's Rules of Practice and Procedure and California Code of Civil Procedure (CCP) Section 581. This motion included an attached Memorandum of Points and Authorities and the Declaration of Daniel Shephard. On

March 2, 2001, AT&T filed a response in opposition to the motion. The County filed a reply to AT&T's response on March 6, 2001.

II. Parties' Position

The County argues that it has the unilateral right to voluntarily dismiss this complaint because the trial has not yet commenced. CCP § 581 allows a plaintiff to voluntarily dismiss his Complaint without prejudice prior to commencement of trial. A dismissal of an action "is available to a plaintiff as a matter of right. The entry is a ministerial, not a judicial, act, and no appeal lies therefrom. [cit.om.] Following entry of such dismissal, the trial court is without jurisdiction to act further in the action." *Associated Convalescent Enterprises v. Carl Marks & Co., Inc. et al., (1973), 33 Cal App. 3d 116, 120.*

The court in *Kyle v. Carmon* (1993 3rd Dist.) 71 Cal. App. 4th, 901, 908, noted:

> "Section 581 allows a plaintiff to voluntarily dismiss a case before 'commencement of trial.' [cit.om.] 'The purpose behind this right is to allow a plaintiff a certain amount of freedom of action within the limits prescribed by the code.' [cit.om.] 'Apart from certain . . . statutory exceptions, a plaintiff's right to a voluntary dismissal [before commencement of trial pursuant to section 581] *appears to be absolute.* Upon the proper exercise of that right, a trial court would thereafter lack jurisdiction to enter further orders in the 'dismissed action' [cit.om.], except for matters such as attorney's fees."
> [emphasis added.]

The County states that it filed this action without consulting with its legal counsel. *See* Shephard Dec., ¶ 4. The action was filed by a County employee who the county alleges had neither the legal experience, nor legal authority from the County Board of Supervisors to file an action. *Id.* Had the County's legal counsel been aware of the proposed submission of the Complaint to the

Commission, the County claims it would have strongly opposed the submission. *Id.* The County's position now is that the Orange County Superior Court is the proper venue for this dispute. The contract between the County and AT&T refers to the "appropriate court in Orange County, California" for resolution of disputes and the Superior Court follows the California Rules of Civil Procedure which provides for more extensive discovery. Shephard Decl., at ¶ 4 and Exhibit "A" attached to its motion.

The County claims its dispute with AT&T is factually complex, and will likely require several phases of discovery before the complexities of billing charges, rate discounts, "extra-contractual" obligations etc., can finally be unraveled. *Id.* At the very least, the County believes a thorough accounting is required of the approximate $650,000 in disputed charges, and such accounting can only come through a vigorous and time-consuming discovery effort. The County claims the Commission's discovery process may not be adequate for such an effort, Decl., ¶ 3, particularly because the Commission cannot award damages.

The County contends that AT&T willfully breached written contracts with the County. As such, the County argues that it is entitled to damages, including consequential damages, and perhaps attorney's fees. The Commission has no jurisdiction to award these damages. The County also claims it has a constitutional right to a jury trial on the disputed factual issues. The County claims it should not be required to pursue a matter in a forum where the County cannot obtain full relief.

As an independent argument to support dismissal, the County argues that because the dispute in this matter is a contract dispute, the Commission lacks subject matter jurisdiction over the entire controversy, and the complaint must

be dismissed. Moreover, the County denies that it has "waived" this jurisdictional defect because by no act or omission may County expand the subject matter jurisdiction of the Commission which is derived from the California Constitution and statutory delegations from the California Legislature. In support of this petition, the County cites Decision (D.) 01-02-057 in Quality Conservation Services vs. San Diego Gas & Electric Company which states:

> "The California Supreme Court in *Hempey v. Public Utilities Commission* (1961) 56 C.2d 214, has held that the Commission may not adjudicate contract disputes absent express authorization by the Legislature. The rule is based on Article VI of the California constitution, which assigns purely judicial functions to the courts."

The County also claims that the funds it has deposited into escrow relating to this complaint should be returned to the County. The County argues that once the dismissal has been granted, the Commission has no authority to transfer the County's funds to AT&T since AT&T has not prevailed in the complaint.

In support of its claim to deposited escrow funds, the County cites *Creative Labs, Inc., et al., v. Orchid Technology, et al.,* 1997 U.S. Dist. (N. Cal.) LEXIS 13911. In *Creative Labs,* the plaintiffs moved to dismiss their complaint without prejudice in the US court, and litigate their claims against the defendants in a court in Singapore. Moreover, as in the present action, the defendant in *Creative Labs* had an alleged interest in funds in an escrow account that could be released to them pursuant to a final judgment in the case.

The *Creative Labs* court granted the plaintiffs' motion to dismiss without prejudice, rejecting the defendants' argument, *inter alia*, that a dismissal without prejudice would constitute legal prejudice and financial harm to the defendants.

The court noted that "the inconvenience of defending another lawsuit or the fact that the defendant has already begun trial preparations does not constitute prejudice." *(Creative Labs, p.3.)* Further, the *Creative Labs* court rejected the defendants' argument with respect to the funds in the escrow account, stating "[t]he escrow account *has no relationship to the merits of this case* and has no effect on defendants' ability to defend this action." *(Creative labs, p. 3,* emphasis added.)

Similarly, the County argues, there is also no relationship between the Commission's escrow account and AT&T absent a judgment on the merits of this action. AT&T has not won anything in this lawsuit.

Response of AT&T

As a general proposition, AT&T argues that where a party files a complaint before this Commission, that party normally is permitted to withdraw the complaint where no activity has occurred on the complaint and no party is prejudiced. AT&T argues, however, that such is not the case here. AT&T argues that California courts have long denied a plaintiff the right to dismiss its case where there has been a determination of law or fact before trial and that determination is adverse to the plaintiff.

In Goldtree v. Spreckels, 135 Cal. 666, 67 P. 1091 (1902) the trial court sustained without leave to amend, two of three causes of action of plaintiff's complaint and thereafter held that plaintiff could no longer voluntarily dismiss his complaint, even if "trail" had not commenced within the usual meaning of that term. "Trial" can take many forms, said the Goldtree court, including the testing of the sufficiency of a complaint on demurrer.

AT&T claims that its motion to dismiss, filed in this complaint on July 31, 2000, was the legal equivalent of a demurrer. Compare Cal. Civ. Proc.

Code § 430.10 ("The party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in Section 430.30, to the pleading on any one or more of the following grounds *** (e) The pleading does not state facts sufficient to constitute a cause of action."); Cal.Civ.Proc. Code § 430.30(a) ("When any ground for objection to a complaint, cross-complaint or answer appears on the face thereof, or from any matter of which the court is required to or may take judicial notice, the objection on that ground may be taken by a demurrer to the pleading.")

The ALJ's Ruling was issued on October 5, 2000 regarding AT&T's motion to dismiss. AT&T claims that ruling is the functional equivalent of an order sustaining a demurrer, arguing that it sustained AT&T's objections to the facial sufficiency of the Complaint in finding a portion of the County's claims absolutely barred as a matter of law. Under similar reasoning as was applied by the California Supreme Court in *Wells v. Marina City Properties*, 29 Col. 3d 781, 787-9, AT&T claims an ALJ ruling, like an order sustaining a demurer, falls within the definition of "trial" under Cal.Civ.Proc. Code § 581, so as to preclude voluntary dismissal as a matter of right. *See also, Harris v. Billings*, 16 Cal.App. 4th 1396, 1402, Cal.Rptr.2d 718, 721 (1993).

AT&T argues that the County may no longer dismiss its Complaint as a matter of right, and that to allow the County unconditionally to dismiss and re-file its Complaint in another forum would expose AT&T "to duplicative 'annoying and continuous litigation.'" *Wells, supra.* AT&T argues that any order of this Commission dismissing this Complaint should be made only on condition that all funds deposited into escrow by the County be turned over to AT&T immediately. Otherwise, AT&T claims the County will have received a windfall of many months of telephone service for nothing, when even its own Complaint

does not seek a complete refund of charges paid. If this Commission believes that it lacks jurisdiction both to dismiss the matter and to release escrowed funds to AT&T, then AT&T's position is that this matter should in no event be dismissed.

AT&T further claims that the County has committed a Rule 1 violation. Rule 1 of this Commission's Rules of Practice and Procedure provides in pertinent part: "Any person who signs a pleading or brief, enters an appearance at a hearing, or transacts business with the Commission, by such act represents that he or she is authorized to do so and agrees . . . never to mislead the Commission or its staff by an artifice or false statement of fact or law. (emphasis added.)

AT&T claims the County violated Rule 1 by submitting mutually contradicting sworn statements to the Commission. On the one hand, in its present motion to dismiss, the County alleges for the first time, after nearly one year of litigation before this Commission, that the County's Complaint was filed "by a County employee who had neither the legal experience, nor legal authority from the County Board of Supervisors to file the action." Declaration of Daniel Shephard dated February 21, 2002 at ¶ 3 (emphasis added).

AT&T argues that Mr. Shephard's assertion under penalty of perjury contradicts the sworn verification of the County's Complaint. On June 15, 2000 Mr. Fred Voss, the County's Manager and CEO for Information and Technology, submitted a verification to the Complaint under penalty of perjury, stating: "I am an authorized employee of the complaining municipality herein, and am authorized to make this verification on its behalf." AT&T argues that either Mr. Shephard's sworn statement, or Mr. Voss's sworn statement, is false. In either case, AT&T claims the County has violated Rule 1.

In its Motion to dismiss, the County counsel asserts under oath, that "Had the County's legal counsel been aware of the proposed submission of the Complaint to the Commission, it would have strongly argued against it." Declaration of Daniel Shephard dated February 21, 2001 at ¶ 4.

Yet, there was no suggestion last summer in the County's Opposition to AT&T's Motion to Dismiss, prepared by its legal counsel and filed months after the Complaint was submitted to this Commission, that the County's Mr. Voss lacked authority of any sort. AT&T claims that the escrow funds should be released to it as a Rule 1 sanction.

The County denies it has committed a Rule 1 violation, and claims that there is nothing inconsistent about County's opposition to AT&T's motion to dismiss filed last July 13, 2000, and County's current motion to dismiss. AT&T's motion to dismiss was based upon its argument that the complaint failed to state a claim for relief, and based upon statute of limitations grounds. County argued that the only proper grounds for dismissal on motion by a defendant are jurisdictional grounds or forum inconvenience grounds. Thus, the County argues, because two motions to dismiss were made by different parties on different legal grounds, there is no inconsistency between its current motion to dismiss and its prior opposition to AT&T's motion.

In its reply comments on the Draft Decision, the County claims that AT&T has attempted to deliberately mislead the Commission in claiming that the County disregarded an ALJ order and in claiming the County would receive free telephone service if escrowed funds were returned to the County. County argues that if the Commission chooses to consider Rule 1 violations by the County, then it should also consider the alleged misleading statements of AT&T as Rule 1 violations.

III. Discussion

A. Dismissal of the Complaint

The County presents two separate grounds upon which this complaint should be dismissed. The first ground involves the question of whether the County may voluntarily withdraw the complaint at this stage of the proceeding because no evidentiary hearings have yet commenced. AT&T's objection involves the question of whether or not a "trial" has commenced at this point in the process.

We recognize that California courts have established a precedent of denying a plaintiff the right to voluntarily dismiss its case where a "trial" has already commenced. In this instance, AT&T argues that the "trial" in this complaint commenced once the ALJ issued a ruling sustaining at least in part, certain objections raised in AT&T's motion to dismiss. AT&T claims that its motion to dismiss was equivalent to a demurrer, and that the ALJ Ruling on its motion was the equivalent of an order sustaining a demurrer since it found a portion of the County's claim barred by the statue of limitations. Since in the *Goldtree* case, the Supreme Court ruled that an order sustaining a demurrer constituted a "trial," AT&T argues that a similar analogy can be drawn in this case.

We are unpersuaded by AT&T's argument that the County is precluded from voluntarily dismissing its complaint as a matter of law because a "trial" has already commenced by virtue of the ALJ Ruling on AT&T's motion to dismiss. While the AT&T motion to dismiss may be construed as somewhat analogous to a demurrer as provided in the Cal. Civ. Proc. Code § 430.10, it also differed in key respects from a general demurrer as was the case in *Goldtree v. Spreckels*. In *Goldtree*, the court sustained a general demurrer without leave to amend. The

plaintiff then attempted to have the complaint dismissed, thereby avoiding the effect of the order sustaining the demurrer. The Supreme Court held that the order sustaining the demurrer constituted a "judgment" on the complaint, thus precluding the plaintiff's voluntary dismissal.

The ALJ Ruling on AT&T's motion to dismiss, however, was different from an order sustaining a general demurrer as was the case in *Goldtree*. The ALJ Ruling did not grant the motion to dismiss, but merely modified the scope of the complaint to exclude disputes relating to time periods barred by the statue of limitations. By contrast, the demurrer granted in *Goldtree* constituted an admission by the defendant of all of the facts of the plaintiff's case. Accordingly, the court reasoned that a judgment could thereby be rendered on such a basis "as a conclusive determination of the litigation on its merits." (*Goldtree v Spreckels, supra,* 135 Cal at 672.)

The court contemplated that "If the demurrer is sustained, [the complainant] stands on his pleading and submits to judgment on the demurrer…" (*Id,* at pp. 672-673.) In this complaint, however, the AT&T motion to dismiss did not admit to all of the facts alleged in the Complainant's pleading. Neither did the ALJ Ruling provide a basis for the submission of parties to any summary judgment of the complaint. Therefore, we find that the situation before us in this complaint is not analogous to an order sustaining a demurrer as contemplated by *Goldtree v. Spreckels* and *Wells*. We find that a trial has not yet commenced, and as such, the legal right of the Complainant to have the complaint dismissed has not been foreclosed.

Yet, while the Complainant retains the right to have this matter dismissed, we disagree with the Complainant's claim that the Commission inherently lacks subject matter jurisdiction over this complaint merely because

the dispute involves a contract rather than a tariff. The California Supreme Court case cited by Complainant in *Hempey v. Public Utilities Commission* (1961) 56 C.2d 214 is not relevant as a precedent in this case. In *Hempey*, the Court ruled that the Commission was not expressly empowered to adjudicate contract rights between a public utility and *third parties*, for example, general creditors. The Court found that general jurisdiction to determine the respective rights of creditors of a public utility reposes with the superior court. Nothing in the Supreme Court Decision, however, removed jurisdiction from the Commission relating to disputes between a utility and its customer pertaining to utility service. Moreover, Public Utilities Code Section 701 broadly states that the Commission is "empowered to supervise and regulate every public utility in the State and may do all things . . . which are necessary and convenient in the exercise of such power and jurisdiction."

The dispute in this complaint clearly comes under this Commission's jurisdiction since it relates to a contract dispute directly relating to utility service rendered to a utility customer. This dispute does not relate to contract rights of any third parties such as general creditors. The fact that the utility service was rendered to the County under a contract instead of a tariff does not remove the service from Commission jurisdiction. AT&T State Calling Service, to which the County subscribed, is a type of AT&T Custom Network Service, as specified in AT&T's California intrastate tariff which is subject to Commission jurisdiction. AT&T's contract with Orange County expressly incorporates the terms, rate, regulations, and conditions of AT&T's California intrastate tariff. Therefore, we reject the Complainant's argument that we inherently lack subject matter jurisdiction over this complaint. Nonetheless, in view of our finding that a trial

has not yet begun in this complaint, the Complainant retains the right to have its case dismissed. On that basis, we grant the motion to dismiss.[1]

B. Disposition of Escrow Funds

The question must be decided as to the disposition of the funds that have been deposited in escrow. There are two questions in dispute: (1) the legal jurisdiction of this Commission to prescribe how the funds are to disbursed between the parties; and (2) the legal and equitable merits of disposition. Unless this Commission were to conduct a trial adjudicate a disposition of the funds between parties, then any legal or equitable argument concerning the disposition is rendered moot. In this particular instance, we have concluded that the complaint shall be dismissed without trial. As such, we have no basis to make a substantive determination as to the merits of the dispute, and what portion of the funds properly belongs to each of the parties. The complainant has failed to provide a precise indication of the amount of escrow funds that are actually in dispute. Complainant claims such quantification cannot presently be made without further assistance from AT&T.

In the absence of any evidentiary basis upon which to identify a prevailing party or to prescribe a division of the escrow funds between the parties, our only recourse is to reverse the transactions that initially established the CPUC escrow account. The reversal of the CPUC escrow deposits, by default, returns the deposited funds to the County, the original payee. The return of these funds in no way constitutes any legal finding that the County has

[1] Although the Commission has jurisdiction over the subject matter of this complaint, we decline to exercise that jurisdiction here. Therefore, this case is not appropriate for application of the doctrine of primary jurisdiction.

prevailed in the complaint. Neither does return of the funds mean that AT&T will have provided free service to the County for nearly a year. The County remains legally liable to AT&T for all charges that a civil court may ultimately find are due and payable under the applicable contract for services rendered. The closure of the CPUC escrow account and the return of deposited funds to the County shall not in any way be construed as judgment on the County's liabilities to AT&T, or the amounts that are properly due and payable to AT&T.

In the event that AT&T ultimately prevails in a subsequent civil court trial, the County will remain liable for any court ordered back charges as well as any interest, penalties, or other sanctions that could be assessed by the court. The dismissal of this complaint in no way prejudges nor limits the rights of AT&T to bring legal action against the County (or to defend itself against action brought against it by the County) in a separate jurisdiction.[2] AT&T retains the legal right to sue (or countersue) the County for nonpayment of its bills, or to seek appropriate interest or penalties for any delay from the date that payments were originally due. Likewise, nothing prevents AT&T from seeking a court order in a separate jurisdiction to establish an independent escrow fund to maintain and preserve disputed billings during the pendancy of any subsequent civil litigation that may ensue. The effect of this order is merely to remove the CPUC from being the custodian of such an escrow account, and to return the funds to the party from which they were received.

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[2] We take notice that the County filed an action against AT&T in the Orange County Superior Court on March 14, 2001, relating to the billing dispute at issue here. AT&T filed a cross-complaint for damages against the County on April 26, 2001. County has been informed that AT&T intends to bring a motion in Superior Court as early as the week of May 28, 2001, to require the disputed funds to be placed in an escrow account.

We agree with AT&T that the reasoning underlying the Creative Labs case involved different circumstances than are present here as a basis for disposing of escrow funds. In that case, the Court found that the "escrow account has no relationship to the merits of this case…" In the Creative Labs case, the escrow account in question related to funds from a purchase agreement between Defendant Orchid and a non-party with the funds to be held in escrow until the litigation was resolved by final judgment. Yet, Plaintiff Creative Labs was not a party to the purchase agreement. Therefore, the court held that the defendant's inability to access the escrow account until the end of litigation "would simply be a collateral consequence of the voluntary dismissal that was created by the defendant's own actions" in filing a summary judgment motion.

Yet, while we agree that there is a more direct connection between the escrow deposits and the dispute in question here, we still find that there is nothing to prevent the return of funds to the County. AT&T's legal rights to pursue litigation are not being compromised merely by returning the escrow funds to the party from which they were received. The Creative Labs case went on to conclude that denying the defendant access to the escrow account "has no effect on defendant's ability to defend this action." Likewise, AT&T retain the ability to defend its legal rights notwithstanding the return of the escrow funds to the County pending civil litigation.

C. Rule 1 Violation

Two issues are raised by AT&T's allegation that the County has committed a Rule 1 violation. The first issue involves the question of whether, in fact, a Rule 1 violation occurred. The second issue involves the question of what form of sanction, if any, may be appropriate in the event that a Rule 1 violation did occur.

Based upon the Declaration of Daniel Shephard, we understand that the County is now taking the position that Mr. Fred Voss, County Manager, required authority from the County Board of Supervisors in order to file the complaint. Accordingly, the prior sworn statement of Mr. Voss that he was "authorized to make this verification [of the complaint] on [the County's] behalf," must be viewed as an erroneous statement. In view of the fact that the County does not regularly appear before this Commission, and that Mr. Voss was not a lawyer, a presumption may be drawn that Mr. Voss was not aware that he lacked authorization to verify the pleading.

Yet, Mr. Shephard further asserts in his Declaration that: "Had the County's legal counsel been aware of the proposed submission of the Complaint to the Commission, it would have strongly argued against it." Given this statement, the question becomes when did the County's legal counsel first become aware of the submission of the complaint. Certainly by the time that County filed its opposition to AT&T' motion to dismiss on July 26, 2000, the County's legal counsel had become aware that the filing had been made by Mr. Voss and that the complaint sought to have the dispute litigated under CPUC jurisdiction. The County's pleading in opposition to AT&T's motion to dismiss bears the signature of the County's legal counsel.

Yet, the County at the time of that filing, made no effort to seek to have the case withdrawn or dismissed. Mr. Shephard fails to explain why the County did not take action to dismiss the case once its legal counsel had discovered that the case had been filed by Mr. Voss without proper authorization, but instead waited until eight months after the filing had occurred to move for dismissal.

If the County's legal counsel "would have strongly argued against [the submission of the complaint before this Commission] at the time it was filed" in

June 2000, Mr. Shephard fails to provide an explanation of why the County did not take immediate action to seek a dismissal upon learning it had been filed which certainly had occurred by July 26, 2000. By allowing the case to proceed to this point, the County has required the expenditure of Commission resources to process and review the various pleadings that have been filed in this complaint since June 2000. The delay in filing the motion also forced AT&T to continue to file pleadings to contest the complaint and to provide the County with telephone service without receiving payment pending disposition of escrow funds relating to the complaint.

If the County's legal counsel has known since at least July 2000 that the original complaint was not properly filed and that this is not the proper jurisdiction in which to litigate, yet intentionally withheld this information from the Commission until February 2001, then there appears to be some reasonable basis to probe further as to whether a Rule 1 violation has occurred. We believe a further showing from the County may be warranted to clarify the intent and basis for its actions in connection with the above-referenced alleged Rule 1 violations. As directed below, we will grant the County's motion to dismiss the complaint. We reserve the right to issue a separate order to show cause as to why the County should not be found in violation of Rule 1 and subject to possible sanctions.

Yet, even if we ultimately were to find that a Rule 1 violation had occurred, the sanction proposed by AT&T, namely turning over to AT&T all of the proceeds held in escrow, is not a proper sanction. AT&T's entitlement to the funds deposited in escrow is a separate legal question that can only be decided after proper litigation of the merits of the dispute before a court of proper jurisdiction. Any sanctions that may be warranted for a Rule 1 violation would

be determined independent of any disposition of the substantive dispute over billings between the parties.

IV. Conclusion

We accordingly grant the motion of the County for dismissal of the complaint without prejudice. The deposited funds in the escrow account shall be returned to the County. The return of the deposited funds in no way prejudges the merits of either party's substantive claims regarding the amount owed to AT&T for past services rendered to the County, or to any other legal or equitable claims that either party may bring in a court of separate jurisdiction. We reserve the option to separately issue an order to show cause as to whether the County should be found in violation of Rule 1 and subject to sanctions in connection with its representations to the Commission relating to this complaint.

We make no judgment at this time concerning the County's allegations that certain statements made by AT&T constitute Rule 1 violation. Because the County's allegations were made in reply comments to a draft decision, there was no opportunity for AT&T to reply to the allegations. Before any further consideration of the County's allegations, AT&T should first be provided the opportunity to file a reply in connection with any order to show cause proceeding. We shall provide such opportunity for AT&T to reply in any order to show cause proceeding.

V. Comments on Draft Decision

The draft decision of the Administrative Law Judge in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure. Comments were filed on May 10, 2001

and reply comments were filed on May 17, 2001. We have taken the comments into account, as appropriate in finalizing this order.

Findings of Fact

1. When a party files a complaint before the CPUC, that party generally is permitted to withdraw the complaint if the motion to dismiss is filed prior to the commencement of trial.

2. California courts have held that once a trial on the merits of a complaint begins, the complainant may not unilaterally withdraw the complaint.

3. California courts have held that a judgment of the sufficiency of a complaint by sustaining a general demurrer, without leave to amend, constituted grounds to preclude a complainant's voluntary withdrawal of a complaint.

4. The ALJ's ruling on AT&T's motion to dismiss in this complaint was not analogous to an order sustaining a general demurrer since the ruling did not grant the motion to dismiss, but merely amended the scope of the complaint.

5. A trial has not yet begun in this complaint.

6. As a general rule, the Commission does not adjudicate miscellaneous contract disputes between public utility and a third party that does not involve customer service.

7. The complaint at issue here involves contract disputes, that directly relate to customer service and is therefore subject to CPUC jurisdiction.

8. During the pendancy of this complaint, the County's payments for telephone service to AT&T were deposited into an escrow account with the Commission.

9. The County failed to quantify the amount of funds in the escrow account that are subject to dispute in this complaint.

Conclusions of Law

1. Because the ALJ Ruling on AT&T's Motion to Dismiss was not the functional equivalent of an order sustaining a general demurrer, it did not provide a basis for judgment on the merits of the case.

2. The County retains the right to voluntarily have the complaint before us dismissed because a trial has not yet commenced.

3. Apart from the right of the County to have the case voluntarily dismissed, this Commission retains subject matter jurisdiction over the substance of the complaint.

4. The dismissal and closing of this complaint means that disposition must be made of the escrow funds on deposit with the Commission.

5. Both the Complainant and Defendant have a direct interest in the disposition of the funds on deposit in the escrow account.

6. In the absence of any evidentiary basis upon which to identify a prevailing party, the escrow deposit transactions should be reversed, thereby returning the deposits to the Complainant.

7. The disbursement of the escrow proceeds to the Complainant does not prejudge the outcome of any civil litigation, but leaves each party free to litigate the amounts due and owing, as well as any applicable damages, in the relevant civil court jurisdiction.

8. The County's motion to dismiss should be granted, effective immediately, so that parties can pursue other avenues for obtaining resolution of their dispute.

9. The Commission retains the right to issue a separate order to show cause as to why the County should not be found in violation of Rule 1 and subject to possible sanctions.

10. Before any further consideration of the County's allegations of a Rule 1 violation by AT&T, AT&T should first be provided the opportunity to file a reply in connection with any order to show cause proceeding.

O R D E R

IT IS ORDERED that:

1. The Motion to Dismiss filed by the County of Orange is granted.
2. The funds on deposit in escrow relating to this complaint case shall be disbursed to the County. The Commission's Fiscal Office is hereby directed to promptly disburse the funds to the County and to close the escrow account.
3. The County remains subject to an Order to Show Cause as to why the County should not be found in violation of Rule 1 and subject to sanctions. In any Order to Show Cause, AT&T shall be provided an opportunity to reply to the allegations of Rule 1 violations made by the County prior to any further action being taken on those allegations.
4. Case 00-06-020 is closed.

This order is effective today.

Dated June 28, 2001, at San Francisco, California.

LORETTA M. LYNCH
President
HENRY M. DUQUE
RICHARD A. BILAS
CARL W. WOOD
GEOFFREY F. BROWN
Commissioners